IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 84704-5

PETER GOLDMARK, AS CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMISSIONER OF PUBLIC LANDS,

Petitioner,

v.

ROBERT M. McKENNA, ATTORNEY GENERAL,

Respondent.

PETITIONER'S OPENING BRIEF

David A. Bricklin
WSBA No. 7583
BRICKLIN & NEWMAN, LLP
1001 Fourth Avenue, Suite 3303
Seattle, WA 98154
(206) 264-8600
Attorneys for Peter Goldmark

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I. INTRODUCTION

Article III, Section 21 of the Constitution states that the Attorney General shall perform such duties "as may be prescribed by law." One such statutory prescription is in RCW 43.12.075, which states: "It shall be the duty of the Attorney General, to institute, or defend, any action . . . when requested to do so by the Commissioner."

This case is about the failure of the Washington Attorney General, Robert McKenna, to comply with this non-discretionary constitutional and statutory duty. The Commissioner of Public Lands, Peter Goldmark, requested that the Attorney General appeal an adverse superior court decision impacting State of Washington trust lands managed by the Commissioner. The Attorney General refused. This action for a writ of mandamus followed.

The Attorney General seeks to establish a dangerous precedent. The Commissioner of Public Lands is elected by the people of the State of Washington. He administers an agency with considerable discretion over the management of millions of acres of public and private lands in the state. Part of that discretion involves the decision on when to initiate and defend litigation and appeals. The Attorney General argues that his judgment of which cases to pursue trumps the Commissioner of Public Lands'. But the

people elected the Commissioner of Public Lands to manage these trust lands, not the Attorney General. And the Constitution and implementing statute (RCW 43.12.075) clearly impose a duty on the Attorney General to institute or defend any action involving public lands upon the Commissioner's request. This Court should reject the Attorney General's effort to turn this clear mandate on its head.

For these reasons and those discussed below, the Commissioner seeks a writ of mandamus directing the Attorney General to maintain the appeal which he has now filed "contingently" or to appoint a Special Assistant Attorney General to do so, if the Attorney General's office cannot do so on its own.

II. ISSUES PRESENTED

1. Does the Washington Attorney General have a non-discretionary duty to represent the Commissioner of Public Lands in an appeal of a superior court decision impacting state trust lands when requested by the Commissioner?

2. Should a writ of mandamus issue requiring the Washington Attorney General (directly or through a Special Assistant) to represent the

Commissioner of Public Lands and the Washington State Department of Natural Resources in the underlying appeal?

3. Is the Commissioner of Public Lands entitled to an award of attorneys' fees?

III. STATEMENT OF THE CASE

A. Factual History

On November 30, 2009, the Okanogan County Public Utility District (PUD) No. 1 filed an action in Okanogan County Superior Court seeking to condemn various parcels of land in Okanogan County, including some parcels of trust lands owned by the State of Washington and managed by the Commissioner of Public Lands, Peter Goldmark. Agreed Statement of Facts, Attachment 1. One issue in the Superior Court proceeding was whether the Okanogan County PUD has the legal authority to condemn State trust lands. Agreed Statement of Facts, Attachment 6 at 4. On cross-motions for summary judgment, the Superior Court ruled that the Okanogan County PUD does have jurisdiction to condemn the State trust lands at issue. Agreed Statement of Facts, Attachments 4, 5.

The Attorney General of Washington represented the Commissioner of Public Lands in the Superior Court proceeding through the efforts of

Assistant Attorney General Pamela Krueger. Agreed Statement of Facts at ¶ 12.

The Superior Court entered an Order Adjudicating Public Use and Necessity on May 11, 2010. Agreed Statement of Facts, Attachment 6. That order explicitly incorporated by reference the summary judgment order on the Okanogan County PUD's condemnation authority. *Id.*

An Order of Public Use and Necessity is subject to appeal pursuant to RAP 2.2(a)(4). The appeal must be filed within 30 days (RAP 5.2(a)), *i.e.*, by June 10, 2010.

On May 25, 2010, the Commissioner of Public Lands asked the Attorney General's Office to file an appeal of the summary judgment decision. Agreed Statement of Facts, ¶ 12. Following additional communications, on June 8, 2010, two days before the appeal deadline, the Attorney General advised that he would not file the appeal. Agreed Statement of Facts, Attachment 9.

The next day, the Commissioner of Public Lands requested the Attorney General to appoint a "Special Assistant Attorney General" to represent his agency. Agreed Statement of Facts, Attachment 12. Later that day, the Attorney General wrote to the Commissioner of Public Lands again

declining to file an appeal and, now, also declining to appoint a Special Assistant Attorney General to do so. Agreed Statement of Facts, Attachment 13.

On June 10, 2010, another party to the Superior Court proceeding, Conservation Northwest, filed a Notice of Appeal. Pursuant to RAP 5.2(f), this had the effect of extending by 14 days the period of time for the Commissioner of Public Lands to file his appeal. The new deadline was June 24, 2010. Agreed Statement of Facts, Attachment 15.

On June 15, 2010, the Commissioner of Public Lands again wrote to the Attorney General pleading that he reconsider his decision to not represent DNR in the appeal and\or to reconsider his decision to not appoint a Special Assistant Attorney General (SAAG) to represent DNR's interests. The Commissioner made a new request, too: "Finally, if you remain adamant that you will neither represent DNR nor appoint an SAAG to do so, I request that you appoint an SAAG to advise me on how to proceed in light of your decisions." *Id.*, Attachment 17.

The Attorney General responded in a letter the next day. *Id.*, Attachment 18. But the letter reiterated the Attorney General's refusal to file the appeal or to appoint a Special Assistant for the purpose of doing so. *Id.*

Further, the Attorney General now stated he also would not appoint a Special Assistant for the purpose of advising the Commissioner on how to proceed. *Id.*

On June 21, 2010, the Commissioner of Public Lands filed this action to obtain a writ of mandamus ordering the Attorney General to file the appeal or to take such other action as is necessary to preserve the rights of his agency to prosecute the appeal.

On June 21, 2010, the Attorney General filed a Contingent Notice of Appeal in the underlying action. Agreed Statement of Facts, Attachment 21. The Contingent Notice of Appeal indicates that if this Petition is denied, the Attorney General will dismiss its appeal. *Id.* at 2. If this Petition is granted and the writ of mandamus is issued, the appeal will be pursued.

B. Procedural Posture

Following the filing of the Petition Against State Officer on June 21, 2010 and additional briefing, the Court, at an *en banc* conference on July 8, 2010, unanimously determined that this matter should be retained for decision by this Court.

An Agreed Statement of Facts was filed by the parties on August 9, 2010. Certain documents attached to the Agreed Statement have been filed under seal. *See* Notation Ruling entered on August 9, 2010.

The Court granted a motion by the Okanogan County PUD to file an *amicus* brief, but denied its motion to intervene, by Order dated August 19, 2010.

IV. ARGUMENT

A. The Attorney General Has a Statutory Mandate to Represent the Commissioner of Public Lands and to File the Appeal at His Request

Article III, Section 21 of the Constitution states:

> The attorney general shall be the legal advisor of the state officers and **shall perform such other duties as may be prescribed by law.**

(Emphasis supplied.)

The "other duties" "prescribed by law" include those in RCW 43.12.075:

> **It shall be the duty of the Attorney General,** to institute, or defend, any action or proceeding to which the state, or the Commissioner or the Board [of Natural Resources], is or may be a party, or in which the interests of the state are involved, in any court of this state, or any other state, or of the United States, or in any department of the United States, or before any board or tribunal **when requested to do so by the**

> **Commissioner,** or the Board, or upon the Attorney General's own initiative.
>
> The Commissioner is authorized to represent the state in any such action or proceeding relating to any public lands of the state.

(Emphasis supplied.) *See also* RCW 43.10.040 (the Attorney General "shall . . . represent" the State and all of its agencies "in the courts . . . in all legal . . . matters, hearings, or proceedings . . ."). Based on this unambiguous constitutional provision and statute, the Attorney General had a non-discretionary duty to file the appeal when requested to do so by the Commissioner.

The Attorney General, like every other lawyer in the state, is bound by the Rules of Professional Conduct. RPC 1.2(a) provides (with exceptions not relevant here) that a "lawyer shall abide by a client's decisions concerning the objectives of representation" and "shall abide by a client's decisions whether to settle a matter." Thus, the Attorney General not only has a constitutional and statutory duty to represent the Commissioner of Public Lands, but an ethical duty, too. *See Deukmejian v. Brown,* 29 Cal.3d 150, 624 P.2d 1206 (1981).

If the Attorney General feels that he is unable to represent the interests of the Commissioner of Public Lands, the Attorney General is authorized to

appoint a Special Assistant Attorney General to do so. RCW 43.10.065. *See also* RCW 43.10.125. The Attorney General has refused to use that authority.

In sum, the Attorney General has a non-discretionary duty to represent the Commissioner of Public Lands and to file and vigorously prosecute the appeal as requested by the Commissioner. This Court should issue a writ of mandamus directing the Attorney General to eliminate the "contingency" from the Contingent Notice of Appeal and to prosecute the appeal or to appoint a Special Assistant Attorney General to do so.

B. The Attorney General's Arguments That His Duty to Represent the Commissioner is Discretionary Are Without Merit

1. There is a statute that imposes a specific duty on the Attorney General to pursue an appeal upon request of the Commissioner

In an attempt to persuade the Court that RCW 43.12.075 does not say what it says, the Attorney General asserted, in his Answer to the Petition:

> The Attorney General is aware of no statute that imposes a specific duty on the Attorney General to pursue an appeal upon the request or direction of the client, official, or agency, nor is there any statute that grants the Commissioner the authority to direct whether and when to file appeals.

Answer at 9. This is an extraordinary statement considering RCW 43.12.075 imposes that very duty and grants the Commissioner that very authority. The

statute explicitly states that the Attorney General has a duty to act upon request of the Commissioner of Public Lands: "It shall be the duty of the Attorney General, to institute, or defend, any action . . . when requested to do so by the Commissioner." RCW 43.12.075.

2. The Attorney General has no common law discretion to ignore the Commissioner's request

The Attorney General asserts he has discretion to ignore the request of the Commissioner of Public Lands based on his view of what will serve the public interest and that RCW 43.12.075 does not "disturb" that discretion. *See* Answer at 8-9, 14. But the sole source of the Attorney General's powers are those set forth in the Constitution. Unlike the system in some other states, the Attorney General in Washington State has no "common law" authority. He only has such authority as is prescribed to him by the Constitution and the statutes implementing the Constitution. *State ex rel. Winston v. Seattle Gas and Electric Company*, 28 Wash. 488, 497, 68 P. 946 (1902), *petition for rehearing denied*, 70 P. 114 (1902).

As was stated by the West Virginia Supreme Court in a case arising under virtually identical constitutional and statutory provisions:

> In summary, the Attorney General's statutory authority to prosecute and defend all actions brought by or against any state officer simply provides such officer with access to his

> legal services and does not authorize the Attorney General "to assert his vision of State interests." The Attorney General stands in a traditional attorney-client relationship to a State officer he is required by statute to defend. His authority to manage and control litigation on behalf of the State officer is limited to his professional discretion to organize legal arguments and to develop the case in the areas of practice and procedure so as to reflect and vindicate the lawful public policy of the officer he represents. The Attorney General is not authorized in such circumstances to place himself in the position of a litigant so as to represent his concept of the public interest, but he must defer to the decisions of the officer who he represents concerning the merits and the conduct of the litigation and advocate zealously those determinations in Court.

Manchin v. Browning, 170 W. Va. 779, 790-91, 296 S.E.2d 90 (1982) (footnote omitted which distinguishes cases from jurisdictions where the Attorney General has "common law" powers and duties).[1] *See also Deukmejian v. Brown, supra.*

Two out-of-state cases quoted at length by the Attorney General in his Answer speak to an Attorney General's general common law duty to protect the broad legal interests of the state. These cases from Minnesota and Massachusetts are directly at odds with the established law of Washington State. *See* Answer at 14-15, fn. 8, *citing Humphrey v. McLerran*, 402 N.W.2d 535, 543 (Minn. 1987); *Feeney v. Massachusetts*, 366 N.E.2d 1262,

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[1] The phrase relied on by the West Virginia Supreme Court ("shall perform such duties as may be prescribed by law") in its Constitution is the same phrase found in

1266, 373 Mass. 359 (Mass. 1977). While the Attorney General in some other states may have "common law powers" that authorize an Attorney General to initiate litigation on behalf of the public interest, our Constitution does not grant our Attorney General "common law" authority. *State ex rel. Hamilton v. Superior Court, Whatcom County*, 3 Wn.2d 633, 640, 101 P.2d 588 (1940). As stated in *State ex rel. Winston v. Seattle Gas & Electric Company, supra*:

> The attorney general of the state, . . . is not a common law officer. . . . Every office under our system of government, from the governor down, is one of delegated powers. It is a well settled doctrine that officers of the State exercise but delegated power, and this is particularly true of the attorney general. His office is created by statute and he, as such officer, can only exercise such power as is delegated to him by statute.

Id. at 495.

Because the Constitution mandates the Attorney General to comply with duties imposed by statute and because the statute directs the Attorney General to institute and defend lawsuits upon the Commissioner's request, the Attorney General had no discretion to invoke the "public interest" as a basis to ignore the Commissioner's request. Article III, Section 21 and RCW

Article III, Section 21 of our Constitution.

43.12.075 combine to create a non-discretionary duty for the Attorney General to file the appeal upon request of the Commissioner.

3. The cases cited by the Attorney General are distinguishable

In his Answer to the Petition, the Attorney General cited a number of cases to support his claim that he enjoys discretion, unbridled by the Constitution and implementing statute. But none of the cases cited by the Attorney General regarding his authority and discretion involve RCW 43.12.075. Not one case cited by the Attorney General suggests that he has the discretion to say "no" when the Commissioner of Public Lands requests that he file an appeal of a Superior Court decision. *See* Answer at 9-14.

RCW 43.12.075 is unique to the relationship between the Attorney General and the Commissioner. Because the Constitution states that the duties of the Attorney General are prescribed by statute and RCW 43.12.075 imposes this specific duty on the Attorney General, the cases deciding authority issues under other statutes are not relevant.

Moreover, none of the Attorney General's cases involved a situation where the Attorney General was refusing to abide by the requests of his client. The first case cited, *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), involved an agency action to collect industrial insurance premiums

from certain businesses. The agency had retained private attorneys to file the action. The question presented was whether private attorneys could represent the agency or whether the Attorney General was the sole attorney who could initiate such an action on behalf of the agency. Thus, the case involved a different issue about a different state agency with different statutory provisions setting forth different authorities and duties. The decision in *Gattavara* that only the Attorney General could initiate such an action sheds no light on the issue here. The Court's statement that state agencies could not "institute actions in their own right, but only in conjunction with the authority of the Attorney General," simply means that agencies must use the Attorney General as their lawyer, not private counsel. It does not answer or even address the issue presented here.

Two other cases relied on by the Attorney General, *Berge v. Gorton*, 88 Wn.2d 756, 761, 567 P.2d 187 (1977) and *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 122 P. 987 (1912), both raised the question of whether a third party – not a client – could demand that an Attorney General initiate an action regarding recovery of funds in different circumstances. Again, these cases involved completely different issues and statutes regarding the Attorney General's authority. Challenges to the prosecutorial discretion of the

Attorney General under different statutes by third parties are simply not relevant in this case.

The Attorney General also relies on *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash. 433, 249 P. 996 (1926), where the State Board of Equalization was levying taxes based on an outdated statute that had been recently amended. The Attorney General sued to stop the practice. The agency asserted that the Attorney General lacked authority to bring the action. But this Court found that the Attorney General is granted statutory authority to prosecute such actions by the language of RCW 43.10.030(2) which authorizes the Attorney General to "institute and prosecute all actions and proceedings . . . which may be necessary in the execution of the duties of any state officer." This Court's finding that the Attorney General enjoys authority to prosecute an action against a wayward state agency is irrelevant to deciding whether the Attorney General has a duty to prosecute an appeal when requested by the Commissioner pursuant to RCW 43.12.075.

In *Dunbar*, this Court rejected the notion that the Attorney General could not sue a state agency even though the Attorney General also had the duty to represent the agency. This Court explained that "where the interests of the public are antagonistic to those of state officers, or where state officers

may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers." But this Court later disavowed the "impossible and improper . . . to defend language." As explained in a recent Court of Appeals case: "The Supreme Court later clarified the *Dunbar* ruling, explaining that the Attorney General may properly represent both sides in an action between the State and one of its officers." *Sanders v. State*, 139 Wn. App. 200, 209, 159 P.3d 479, *aff'd* 166 Wn.2d 164, 2071245 (2009) *citing Reiter v. Wallgren*, 28 Wn.2d 872, 879-80, 184 P.2d 571 (1947) (a case relied on by the Attorney General in its Answer). Thus, *Dunbar* stands for the proposition that the Attorney General may sue a state agency, not that the Attorney General need not defend a state agency, even one that the Attorney General believes to be misguided.

But while the issue decided in *Dunbar* was different than the one presented here, note that the analytic framework in *Dunbar* was the same as that suggested by the Commissioner in this case. In *Dunbar*, the Court sustained the Attorney General's action by finding a statute that authorized it (RCW 43.10.030(2)). The Court did not imbue the Attorney General with "common law" authority untethered to any constitutional or statutory provision.

The Attorney General also cites *In Re: Coordinated Pretrial Proceedings in Petroleum Products Anti-Trust Litigation*, 747 F.2d 1303 (9th Cir. 1984), where the court ruled that it lacked jurisdiction to hear an appeal of a contempt order against the Attorney General, individually, regarding discovery issues before entry of a final judgment on the State's underlying action. The Court reasoned that the Attorney General and the State has a "congruence of interest" requiring the Attorney General to await final judgment on the State's case before his appeal could be heard. In finding "congruence," the Court reasoned that the determination whether to bring the action rests "within the sole discretion of the Attorney General." *Id.* at 1306. But the two Washington cases it cited for that proposition construed a different statute then the one at issue here. That other statute, RCW 43.10.030, clearly gives prosecutorial discretion to the Attorney General when it states the Attorney General "shall . . . institute and prosecute all actions . . . which may be necessary . . ." The "which may be necessary" clause clearly provides discretion. The statute at issue here contains no comparable language.

Indeed, RCW 43.10.030(2) was distinguished on precisely that basis in *Sanders v. State, supra*, 139 Wn. App. at 209: "[T]he critical phrase

'which may be necessary' which gives the attorney general discretion to litigate in RCW 43.10.030(2) is absent in RCW 43.10.030(3)." It is absent in RCW 43.12.075, too.[2]

4. The Attorney General's discretion regarding "legal strategy" does not equate to discretion to override the Commissioner's request to file an appeal

The Attorney General also argued that RCW 43.12.075 does not give the Commissioner the authority to "direct" legal strategy. Answer at 8-9. There is a distinction between directing the "legal strategy" of a case and the ultimate decision of whether to initiate a lawsuit or file an appeal of an adverse decision. A lawyer may make strategy decisions as litigation proceeds, but the client decides whether to engage in litigation in the first place or to terminate it. RPC 1.2(a).[3]

Disregarding the plain language of the first sentence in RCW 43.12.075, the Attorney General focuses on the second sentence. The

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[2] Likewise, RCW 43.10.030 makes no reference to a client agency directing the Attorney General to initiate an action. The statute at issue here does.

[3] The Attorney General's Answer to the Petition refers to RPC 1.26, Comment 18 which mentions that government lawyers in some circumstances "may" have authority to decide upon settlement or whether to appeal from an adverse judgment. Clearly, in this case the Attorney General does not have that authority because RCW 43.12.075 states that it is the Attorney General's duty to appeal from an adverse judgment when requested to do so by the Commissioner of Public Lands.

Attorney General argues that because the Commissioner cannot practice law or be a legal representative for the Department, "the likely purpose of that [second] sentence is to simply allow the Commissioner to be named as the party in interest in proceedings relating to public lands. . ." Answer at 7.

The Attorney General's statutory duty is created in the first sentence, not the second. The Attorney General's focus on the second sentence is misplaced. Moreover, in the second sentence, the word "represent" obviously does not mean "to represent in a legal capacity" but, rather, means "has the authority to speak on behalf of" the State in a state trust lands action. The second sentence does not limit or modify either the first sentence's grant of authority to the Commissioner nor its imposition of a specific duty on the Attorney General.[4]

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[4] In a footnote in his Answer to the Petition, the Attorney General discusses the parameters of the Commissioner's role as compared to the role of the Board of Natural Resources. The Attorney General implies that because the Commissioner is the "Administrator" of the agency, he somehow is not authorized to represent the State in an action relating to public lands of the State. Yet again, the Attorney General presents an argument that is directly at odds with the plain language of RCW 43.12.075. The Commissioner is explicitly authorized to represent the Department of Natural Resources in all decisions related to the litigation in Okanogan County per that provision. Furthermore, while RCW 43.30.215(2) indicates that the Board sets policy for the Department of Natural Resources, the Commissioner has considerable independent authority. *See, e.g., Caffall Bros. v. State*, 79 Wn.2d 223, 484 P.2d 912 (1971) (Commissioner has discretion to determine if sale of public land will serve "best interests" of the State); *In Re: Kane*, 181 Wash. 407, 410-11, 43 P.2d 619 (1935) (Commissioner has discretion to determine if lease of public lands will serve "best interest of the state").

5. The Attorney General's defense of the Commissioner in Superior Court does not relieve the Attorney General of his duty to file the appeal upon the Commissioner's request

The Attorney General also argued in his Answer that he already complied with RCW 43.12.075 because of the defense he provided in the Superior Court action. But that begs the question concerning his refusal to appeal the adverse Superior Court decision despite the Commissioner's request that he do so. RCW 43.12.075 does not limit the Attorney General's duty to initiating an action in Superior Court; rather, it also requires the Attorney General to defend any action in any other State court, including the Court of Appeals, at the request of the Commissioner.

In sum, the Washington Constitution and RCW 43.12.075 impose on the Attorney General a clear, non-discretionary duty to provide representation to the Commissioner of Public Lands in the underlying appeal upon the Commissioner's request. None of the Attorney General's defenses raise a credible argument to the contrary.

C. Mandamus Is Appropriate to Compel the Attorney General to Take a Non-Discretionary Action

The Commissioner of Public Lands seeks a writ to compel the Attorney General to exercise his non-discretionary duty to provide the

Commissioner with legal representation as mandated by constitutional and statutory authorities. Issuance of a writ of mandamus is appropriate where a public official refuses to take an action that is non-discretionary. *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 805, 982 P.2d 611 (1999). Moreover, mandamus is an appropriate means to compel a governmental official to comply with the law when there is a duty to act. *Walker v. Munro,* 124 Wn.2d 402, 407-08, 879 P.2d 920 (1994). The Attorney General has a clear duty and no discretion in this matter. "[W]hen requested so to do by the Commissioner," it "shall be the duty of the Attorney General" to "defend any action or proceeding" to which the State or the Commissioner of Public Lands is a party. As stated in another direct action mandamus case, "the use of the word 'shall' makes it clear that [the state officer] is charged with a mandatory duty. *Id.*

D. This Court Should Grant the Request for Reimbursement of Attorneys' Fees

Petitioner seeks reimbursement of attorneys' fees. RCW 4.84.185 allows a prevailing party to recover attorneys' fees and other litigation expenses if the defense to the action was "frivolous and advanced without reasonable cause." The Washington State Constitution and RCW 43.12.075 leave no question that the Attorney General had a duty to abide by the request

of the Commissioner of Public Lands to appeal the Superior Court decision in the underlying case. The duty of the Attorney General to represent the petitioner and his agency is unqualified. The Attorney General has no reasonable basis for contending otherwise.

The Attorney General's response in his Answer to the Petition regarding that duty relies on clearly irrelevant cases involving such issues as third parties seeking to force the Attorney General to use his prosecutorial discretion and the common law authority of attorney generals in other states. Given the irrelevance of these cases and the unambiguous law we have cited, any defense is frivolous, the writ should issue, and an award of attorney's fees is appropriate.

V. CONCLUSION

For the foregoing reasons, Petitioner requests that the Court issue the writ of mandamus, and direct the Attorney General to prosecute the appeal as requested by the Commissioner and to eliminate the "contingency" from the previously filed Notice of Appeal. Moreover, because the Attorney General's defense of this action is frivolous and advanced without reasonable cause, this Court should enter an award of attorneys' fees and litigation costs.

Dated this 9th day of September, 2010.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: _____
FOR David A. Bricklin WSBA 24928.
WSBA No. 7583
Attorneys for Peter Goldmark

Goldmark\Opening Brief